

*Luana Ross*

# INVENTING



# THE SAVAGE

THE SOCIAL  
CONSTRUCTION  
OF NATIVE  
AMERICAN  
CRIMINALITY

PART I

# Colonization and the Social Construction of Deviance

*The United States may not have written the book on ethnic cleansing, but it certainly provided several of its most stunning chapters—particularly in its treatment of the American Indian. . . . Americans, as de Tocqueville long ago recognized, are a future-oriented people with a short historical memory. And the accepted, widely taught versions of history are written by the victors, presented in schools as sanitized costume pageantry. This is especially true when the victory is as total as that of America's forefathers over the American Indians, who were nearly "cleansed" from an entire continent—an outcome the likes of which Bosnia's Serbs can only dream.*

KENNETH DAVIS

*"Ethnic Cleansing Didn't Start in Bosnia"*



One

## WORLDS COLLIDE

### NEW WORLD, NEW INDIANS

*The more [Indians] we can kill this year the less will have to be killed the next war, for the more I see of these Indians, the more convinced I am that they all have to be killed or be maintained as a species of paupers.*

GENERAL WILLIAM T. SHERMAN, 1867  
(quoted in Sharon O'Brien, American Indian  
Tribal Governments)

Once, all Native American tribes were largely free of the impositions of external social forces. These indigenous people did not live in isolation, although each nation had separately constructed a unique world. But their meetings, even when conflictual, never followed the notion of absolute dominance by means of total war that justified European and Euro-American invasion and occupation (Jaimes and Halsey 1992).

When Europeans first came to this country, there were approximately ten to twelve million indigenous people living on the land that became the United States (Dobyns 1983). These indigenous people were divided into numerous autonomous nations, each with its own highly developed culture and history. Politically, the indigenous people were not weak, dependent groups of people but rather powerful equals whom the early colonists had to deal with as independent nations.

Over the years, Native people have been stripped of most of their resources by the aggressive "settlers" who subjected them to unilateral political and economic exploitation and cultural suppression (Talbot 1981; Weyler 1982). Although Native nations are still politically distinct from the United States, under the definition of colonial theory today's Native nations are colonies. One of the main motives of colonialism is economic exploitation, and cultural suppression almost invariably ac-



companies colonialism (Blauner 1972; Talbot 1981). Cultural suppression is a legal process that involves deculturation—eradication of the indigenous people's original traditions—followed by indoctrination in the ideas of the dominators so the colonized may themselves assist the colonial project (Talbot 1981). The process, in which the colonized are removed from their cultural context through enslavement or transplantation, involves the abandonment of culture and the adoption of new ways of speaking, behaving, and reasoning.

The destruction of indigenous cultures includes the eradication of their judicial systems. Law has repeatedly been used in this country to coerce racial/ethnic group deference to Euro-American power. Understanding this history of colonization is essential because Native criminality/deviancy must be seen within the context of societal race/ethnic relations; otherwise, any account of crime is liable to be misleading. Any explanation of Native criminality that sees individual behavior as significant overlooks the social and historical origins of the behavior. A thorough analysis of Native criminality must include the full context of the criminal behavior—that is, their victimization and the criminalization of Native rights by the United States government.

## NATIVE WORLDS

As with other social worlds, Native societies are the result of the world-building activities of their members. This unending pursuit contains a variety of aspects, some of which are included in a social phenomenon known as social control. This area, which includes the concept of deviance and the manner and appearance of its construction, is my concern.

There is a widely held belief that the Americas' indigenous people were completely lawless. Nothing could be further from the truth. Although the standards of right and wrong varied widely, as did the procedures for punishing transgressors, Native groups all exercised legal systems founded upon their own traditional philosophies.<sup>1</sup> The law was a part of their larger worldview (Barsh and Henderson 1980; Deloria and Lytle 1983, 1984; Yazzie 1994). According to Rennard Strickland, "law" is more than statutes and balanced scales:

Law is also a Cherokee priest listening to the spirit world while holding the sacred wampums in hand and the Cheyenne soldier-society warrior draped in the skin of a wolf. In fact, a command from the spirit world can have greater force as law than the most elaborate code devised by the most learned of men. For law is organic. Law is part of a time and a place, the product of a specific time and an actual place. (1975, xiv)

As Deloria and Lytle write,

Indian tribes, as we shall see, were once primarily judicial in the sense that the council, whether it was that of a village, a league of tribes, or a simple hunting band, looked to custom and precedent in resolving novel and difficult social questions that arose. . . . The task of the council, when it had a difficult question to resolve, was to appeal to that larger sense of reality shared by the people of the community and reach a decision that the people would see as consonant with the tradition. Few new laws or customs were needed and when these occasions presented themselves the homogeneity of the community made the adoption of the innovation simple. (1983, xi)

We are reminded that Indian Country<sup>2</sup> had no prisons:

. . . as Native people, we believe in truth, and not the facts. That is why we never had to sign a receipt, because we knew we were dealing with each other in an honest way. . . . We never had locks on our tipis . . . go ahead and dig all you want to search for the history of the Americas, and you will never find evidence of prisons. (Deere 1980; quoted in Weyler 1982, 98)

Native people continue to survive and reach forth, extending, building Native worlds as best they are able. Part of these efforts concerns the recuperation of Natives whose path takes them outside the natural order or across Euro-American legal lines. It is these Natives and the manner of their contact with other Natives and Euro-Americans, especially the "official" ones, that is now our concern. The United States has the distinction of incarcerating more of its people than any other



country. Natives are now locked up in great numbers, jailed in buildings constructed in line with the system of legislated law, which the United States proudly and forcefully imposes on Natives.

Prior to the coming of this law and its jails, Natives were free to follow laws seen as coming from a natural, external place instead of flowing from the pens of men. On occasion, Natives did not follow Native ways. How much this happened is difficult to ascertain, but it surely was little compared to the deviance apparent in today's society. Natives involved in these situations knew what was amiss and met together to search out a remedy. These meetings, authorized by the wise—whose age, gifts, and spirit were acknowledged—looked for a path that would compensate for the injured and recuperate the offender.

The primary goal was simply to mediate the care to everyone's satisfaction. It was not to ascertain guilt and then bestow punishment upon the offender. Under Anglo-American notions of criminal jurisprudence, the objectives are to establish fault or guilt, and then to punish. . . . Under the traditional Indian system the major objective was more to ensure restitution and compensation than retribution. (Deloria and Lytle 1983, 111)

Precontact Native criminal justice was primarily a system of restitution—a system of mediation between families, of compensation, of recuperation. But this system of justice was changed into a shadow of itself. Attempts were made to make Natives like white people, first by means of war and, when the gunsmoke cleared, by means of laws—Native people instead became “criminals.” *Criminal* meant to be other than Euro-American. We will see that Euro-Americans sought to delegitimize Native worlds and attacked their constructs, including Native justice systems, which were systematically torn down, eroded, and replaced.

One damaging effect of colonization has been its influence on the structure of Native governments. The expansion of Euro-American legality contributed greatly to the further decline of tribal systems, already rocked by foreign invasion. For instance, except in a few early treaties, in regulating Native-white relations, Euro-Americans insisted that disagreements and crimes be disposed of in Euro-American fashion.<sup>3</sup> Consequently, political discretion, generally handled in Native societies by a council of elders and the clans, came to be assumed by Euro-Americans, greatly weakening the traditional councils.

## FENCING INDIAN COUNTRY: DISRUPTIVE POLICY AND LEGISLATION

By the end of the eighteenth century the newly independent United States had cleared the eastern seaboard of most of its original inhabitants (Josephy 1984). At the turn of the century, the most intense wave of westward migration began in earnest, driven by land speculation. Speculators, often backed by New England and European banks, cheaply purchased large tracts of land from the federal government, who had procured it (often forcibly) from Native nations. The land was sold in smaller tracts, at considerable profit, to white settlers (Johansen and Maestas 1979).

Colonialism, thus, did not end with the Declaration of Independence. The United States continued colonizing after its revolutionary war. All the characteristics of colonialism—unilateral political control, economic exploitation, and cultural oppression—were present in Euro-American expansionism in the nineteenth century. Colonialism remained, albeit manifested more subtly.

Racialized oppression, then as now, was not a discrete phenomenon independent of larger political and economic tendencies. Nineteenth-century laws and their enforcement can readily be seen as instruments for maintaining social and economic stratification created in the centuries before. In a greedy, expanding young nation building law and custom on the ownership of property, crime control was part of the maintenance of that sacred foundation. Law-enforcement officials were not simply bystanders in this history; they participated in and encouraged lawlessness in the interests of suppressing minorities. As remaining Native lands were seized and resisting tribes massacred, federal officials often looked the other way or were actively involved (Brown 1970). Genocide against Native people was never seen as murder. Indeed, in the Old West the murder of Natives was not even a crime (Heizer 1974; Hurtado 1988; Schwartz and Disch 1970). Native men and women, their humanity cast aside, were commonly referred to as “bucks” and “squaws.” Those not exterminated faced dire circumstances. For instance, the state of California enacted “The Act for the Government and Protection of Indians” in 1850, amended in 1860. Despite the title of the act, it allowed white people to simply take Native children, those orphaned or supposedly with parental consent, as indentured slaves (Hurtado 1988). The law also “virtually compelled



Indians to work because any Indian found 'loitering or strolling about' was subject to arrest on the complaint of any white citizen, whereupon the court was required within twenty-four hours to hire out arrestees to the highest bidder for up to four months" (Hurtado 1988, 130).

During early contact with Europeans, tribes retained exclusive jurisdiction over such issues as law and order. This right followed the assumption that tribes possessed complete sovereign powers over their members and lands. Tribal sovereignty, as defined by Euro-American law, was upheld in two early major U.S. Supreme Court cases: *The Cherokee Nation v. Georgia* (1831) and *Worcester v. Georgia* (1832). Tribes did not intend to give up their culture, social organization, or self-government; therefore, according to treaties, tribes were to retain their system of criminal justice (Ortiz 1977).

Native legal and political status changed, however. One factor in this transformation was the view Europeans and Euro-Americans historically had, and continue to have, of Natives. Indigenous people's land and other resources were desired by ethnocentric Europeans and later Euro-Americans, who expressed their cultural superiority as the justification for the expropriation of Native lands. Natives were regarded as "savages," legitimizing the removal of Natives from the westward path of civilization's progress (Berkhofer 1978). The ideology of Native inferiority was used to justify both genocide and attempts to supposedly assimilate Natives into the dominant society. Whatever the intent, the common denominator was the assertion that Native societies were lower on the evolutionary scale. Accordingly, the stereotype of the "savage, inferior" Native was carefully developed, and Natives were seen and treated as deviant. In this manner, the ground was prepared for the entry of "modern, rational" Euro-American law into Indian Country.

One product of colonialism is, thus, the controlling of indigenous people through law. The values that ordered Native worlds were naturally in conflict with Euro-American legal codes. Many traditional tribal codes instantly became criminal when the United States imposed their laws and culture on Native people. New laws were created that defined many usual, everyday behaviors of Natives as "offenses." The continuous clashing of worlds over the power to control Native land and resources constantly brought Native people in conflict with the legal and judicial system of the United States, which demonstrates the political intent and utility of Euro-American laws.

Crucial to understanding Native criminality is knowledge of the disruptive events brought about by assimilationist, racist policy and prohibitive legislation mandated by federal, state, and municipal governments. These policies and accompanying criminal statutes were concerned with cultural genocide and control as the tenacious Euro-Americans, seeking to replace tribal law and order with their own definitions of criminality and due process, increasingly restricted the power of Native nations.

The Euro-American surge to gain legal and judicial control over tribes included the creation of the Bureau of Indian Affairs (BIA). To relieve the military while retaining control of tribes, the federal government created the BIA within the War Department in 1824. In 1849 the BIA was transferred to the Department of the Interior. Additionally, the early part of that same century saw the federal government's first attempts to impose federal criminal laws on nonconsenting tribes. The effort to facilitate Euro-American encroachment on Native lands was led by the U.S. Congress, which awarded itself federal jurisdiction over Natives by passing the General Crimes Act in 1817. The tribes retained exclusive jurisdiction only over offenses in which both the offender and the victim were Native (Barsh 1980). In all other cases, tribes now held concurrent jurisdiction with the federal government.

Another intrusion by the federal government into Native affairs was launched in 1825, when Congress passed the Assimilative Crimes Act. This act expanded the number of crimes that could be tried by federal courts when offenses were committed on Native land. The act is limited to interracial crimes and is not applicable when crimes are committed between Natives on reservations (Deloria and Lytle 1983).

From the mid- to late nineteenth century, the overriding task of the federal government was, in theory, the "civilizing" or "Americanizing" of tribes (Prucha 1973). In practice, the goal seems to have been to obtain Native land and resources. This era featured the "Friends of the Indians," a group of Euro-Americans that worked in common to "save" Natives from their "primitive" ways. This well-placed group, which can be likened to Howard Becker's (1963) moral crusaders, applied considerable political pressure in an effort to get their reforms enacted. The reformers, solidly agreeing that the Americanization of Indians required that they be brought under the protection and restraints of Euro-American law, worked to bring a special set of courts and procedures to the reservations. These procedures were to hasten their illusive assimilation.



The influential reformers pressured the Department of the Interior to take action against the "savage and barbarous" practices of the Natives (Prucha 1973). The vehicle chosen to accomplish this task was the Court of Indian Offenses. These courts were composed of Native judges, handpicked by BIA Indian agents, who satisfied the agents, not tribal communities (Deloria and Lytle 1983). The judges were supposed to be men with high moral integrity who "engage in civilized pursuits"; the requirements stated also that "no person shall be eligible to such appointment who is a polygamist" (Morgan 1882; quoted in Prucha 1973, 301).<sup>4</sup> Preference was given to those who read and wrote English. The judges were to bring Natives "under the civilizing influence of law" (Teller 1883; quoted in Prucha 1973, 299). Indirect rule, along the British colonial model, was thus established with the formation of Indian police and judges in the latter part of the nineteenth century (for a full description, see Hagan 1966). These men were employed to police other Natives according to Euro-American law in another attempt to Americanize indigenous people.

The regulations for the Court of Indian Offenses were drawn up in 1883 by Thomas Morgan, then Commissioner of Indian Affairs. Morgan listed offenses and the appropriate punishments. The following constituted offenses: plural or polygamous marriages; immorality; intoxication; destroying property of other Natives (this speaks to mourning practices: destroying the property of the deceased was customary in many tribes); any Native dance "intended and calculated to stimulate the warlike passions of the young warriors of the tribes" (Teller 1883; quoted in Prucha 1973, 296); and the practices of medicine people, which were seen as "anti-progressive," because medicine people used their power in "preventing the attendance of the children at the public schools, using their conjurers' arts to prevent the people from abandoning their heathenish rites and customs" (Teller 1883; quoted in Prucha 1973, 297-298). In some tribes spiritual leaders had assumed broader roles after the slaying or arrests of war leaders, so by criminalizing their practices the courts seized the authority of traditional tribal leaders.

Misdemeanor offenses generally covered Native neglect to engage in what Euro-Americans defined as "work." The Protestant work ethic was upheld to Natives, and failure "to adopt habits of industry, or to engage in civilized pursuits or employments," brought swift punishment (Morgan 1892; quoted in Prucha 1973, 304). Clearly these courts were

used to suppress Native worlds, which were made criminal, and especially to attack their religion. This repression of religion forged ahead at full steam until 1934, when the Indian Reorganization Act somewhat lessened the court's powers. The ban on alcohol, which came in the early nineteenth century, was not lifted until 1953.

In 1881 an important event occurred in Indian Country. A Lakota named Crow Dog killed another Lakota by the name of Spotted Tail (Harring 1994). As their tribal custom decreed, the matter was remedied by Crow Dog's family paying restitution to the victim's family. Under Lakota law Crow Dog would not be further punished, let alone executed. White people, however, were enraged over the much-publicized case and demanded that the United States seize jurisdiction over the tribes and punish Crow Dog "properly." *Ex parte Crow Dog* (1883) opined that the United States did not have the jurisdiction to prosecute a Native when the crime was against another Native. Euro-American reformers thought that to allow such a "primitive" form of justice to prevail was lawless (Deloria and Lytle 1983). Their furor led to the passage of the Major Crimes Act of 1885, whereby Congress unilaterally gave federal courts jurisdiction in Indian Country (when the offenders were Native) over seven major crimes. The act was later amended to include fourteen felonies.<sup>5</sup>

This delineation of certain crimes in Indian Country to be federal offenses outside tribal jurisdiction established a pattern that has held to the present. By taking jurisdiction over crimes, the federal government also assumed the power to punish. Significantly, the act applies only when the offender is Native, although the victim may be Native or non-Native, and the offense must be committed within the legal definition of Indian Country (Deloria and Lytle 1983).

Some of the daily operations of this act are seen by Dumars (1968), who contends that Native Americans charged with major crimes on an Indian reservation receive harsher treatment than non-Natives charged with the same crimes on a reservation. Using the example of assault with a deadly weapon, Dumars demonstrates that Natives convicted of this crime receive from federal judges penalties twice as harsh as those given non-Natives committing the same crime but falling under state jurisdiction. Hence, in their lurch to possess Indian Country, Euro-Americans in Congress defined crime differently for Natives than for themselves, with the Native definition requiring less proof for conviction in Euro-American courts (Deloria and Lytle 1983).



In 1887 another direct violation of treaties came with the passage of the General Allotment Act. This policy, again backed by Euro-American reformers, was aimed at the destruction of Native worlds by making their reproduction impossible. Reformers determined that the individualization of property in Indian Country would spark Native initiative. The "civilizing" design was intended to break up the alleged communistic notion of holding land in common and, most important, to open up Native land for Euro-American takeover (Prucha 1973). The president was awarded absolute authority to allot Native reservation lands to individual Natives and turn over the "surplus" to white people. As a result, Native lands were reduced from 138 million acres in 1887 to 48 million acres by 1934, and the reservations subjected to allotment are now checkerboards of white and Native land. The General Allotment Act left a tangled legacy of land ownership and jurisdictional patterns, persisting even today, that pushed Natives further into poverty.

The degree of Native acceptance into white communities, a supposed goal of the Friends of the Indians, demonstrates the treatment of Natives by the Euro-American legal framework. One way to test an ethnic group's acceptability is their eligibility for citizenship. In colonial times, for example, Natives were never considered citizens; accordingly, they did not hold voting rights, nor could they participate in colonial politics (Kawashima 1986). In 1871 voting rights were denied in Montana Territory to those living at Indian agencies, on reservations, or in Indian Country. Furthermore, the Montana Enabling Act, passed in 1889 (the year Montana secured statehood), again prevented Natives from voting in their homeland (Svingen 1987).<sup>6</sup>

The troublesome legal status of people of color in the United States during the nineteenth century is well documented in a series of court decisions. For example, in *People v. Hall* the California Supreme Court decided in 1854 that a California statute excluding Natives and African Americans from testifying in court cases involving whites additionally applied to Chinese Americans (Cushman and Cushman 1958). Forbidden from testifying against whites, people of color were deprived of the usual means of legal protection. For example, in 1851 in California a white man was released for the murder of a Native man because the only witness was a Native, and the law did not permit his testimony (Heizer 1974). In 1866 Congress, overriding President Johnson's veto, gave equal rights to all persons born in the United States—except Na-

tives (Brown 1970). In 1884, in *Elk v. Wilkins*, a Native man was denied the right to vote in Nebraska on the grounds that he was not a citizen of the United States, although he was living off the reservation (Barsh and Henderson 1980). This decision explicitly ruled that Native people did not have the right to citizenship (Hoxie 1984).

The technological world of the nineteenth century was represented by the philosophy and accomplishments of Francis Amasa Walker, Commissioner of Indian Affairs during the 1870s. Using a scientific management theory, Walker proposed that the federal government impose on Natives "a rigid reformatory discipline" (Takaki 1979, 186). According to historian Ronald Takaki,

The crucial term is *reformatory*. The "discovery of the asylum" in white society had its counterpart in the invention of the reservation for Indian society. Based on "the principle of separation and seclusion," the reservation would do more than merely maintain Indians: It would train and reform them. (1979, 186; emphasis in original)

Walker viewed Natives as biologically inferior beings with "strong animal appetites and no intellectual tastes or aspirations to hold those appetites in check" (quoted in Takaki 1979, 187). Once confined on reservations, Natives would be obligated to work as part of the Americanizing project.

As the nineteenth century closed, Native people were confined, imprisoned on reservations. Those who resisted had been forcibly removed from their homelands, with many massacred in the process. One outrageous example is the 1890 Wounded Knee massacre, in which the U.S. Army murdered over two hundred unarmed Natives, including many women and children. The Army later opposed compensation to the survivors on the grounds that the "battle" (massacre) had been essential in the dissolution of the Lakota Ghost Dance religion (Johansen and Maestas 1979). Cultural oppression of Natives remained blatant, and Native opposition—whether militaristic, legal, or spiritual—would not be tolerated by the federal government.

In the obstructive policies of the nineteenth century, which caused intense jurisdictional conflicts and unequal justice, the social construction of deviance becomes obvious. Euro-American interest groups' involvement in the development of new laws for Natives created a situa-



tion in which, as put forth by Austin Turk (1969), the interests of the more powerful groups were legitimate while those of the less powerful were made illegal.

The pervasive political, economic, and cultural control of Native nations by the federal government continued into the present century. For all its brutality and intensity, this colonial control has not terminated Native sovereignty. It has, however, suppressed its exercise. Cultural oppression facilitates economic exploitation, and twentieth-century federal policy toward Natives follows this pattern. Aside from laws, the federal government has actively pursued policies, rules, and regulations designed to suppress the Native worlds. For instance, in 1901 all agents and superintendents were notified to enforce the "short hair" order. To the federal government, long hair signified a primitive culture. All Native men who refused to cut their hair were refused rations, and those working for the government were released from their duties (Prucha 1984). During the 1920s the BIA strictly limited Native dancing, and those under age fifty were prohibited from participating in their traditional dances (Price 1973). A BIA document issued in 1924 noted that "there are large numbers of Indians who believe that their native religious life and Indian culture is frowned upon by the government, if not actually banned" (Price 1973, 207).

The BIA saw its powers enhanced with the passage of the Indian Reorganization Act (IRA) in 1934. This act was ostensibly intended to strengthen tribal authority and legal systems by letting tribes establish their own governing organizations—the elected tribal councils of today. However, it smacks heavily of indirect rule, again along the British colonial model, as the United States recognizes only the leadership of the councils. Natives were empowered to rule other Natives, incredibly complicating reservation life when traditional tribal leaders were usurped by elected tribal councils.

The IRA also converted Courts of Indian Offenses into tribal courts, and the modern tribal court system was born. Tribal codes enacted after 1934 followed the BIA model. Tribal courts and codes are subject to the approval of the BIA and are limited in their power to the handling of misdemeanors. Although this policy gave the appearance of maintaining the status quo, Deloria and Lytle (1983) offer that the new tribal courts did promise to resurrect the traditional customs of Native people. The balancing act for tribal courts today is to recuperate and retain

tribal traditions of justice despite being immersed in contemporary Euro-American jurisprudence. Tribes work to retain their ways and are reluctant to follow Euro-American legal procedures exclusively. On Indian reservations,

The desired resolution of an intratribal dispute is one that benefits the whole Indian community (family) and not one designed to chastise an individual offender. Non-Indian critics may not understand such a concept of justice, but within Indian traditions it is an accepted and expected norm. (Deloria and Lytle 1983, 120)

Issues of sovereignty are vital to Native people and the tribal court system, no matter what the cost. Tim Giago, editor of *Indian Country Today*, contends that tribal courts on Indian reservations must acknowledge their sovereign status. Discussing the case of Peter MacDonald, a former Navajo tribal chair who is serving a fourteen-year sentence for conspiracy and bribery in tribal and federal courts, Giago expresses:

[I]f the Navajo Nation really believed in sovereignty it would have tried Mr. MacDonald within the borders of their Nation instead of allowing federal officials to take him off the reservation and try him before an all-white jury in Prescott, Arizona. This was hardly a jury of his peers and few, if any, of the jury members understood anything about the Navajo Nation, its laws, customs, or traditions. (1995, 2)

### THE COMPLICATED EFFECTS OF PUBLIC LAW 280

Plunder normally characterizes only the early stage of colonialism, although it is possible to find subtle forms of plunder by the United States in the twentieth century. For example, beginning in the late 1940s and lasting into the 1960s, the federal government shifted toward a policy of termination, another violation of treaties. Rather than struggling to dominate tribal land, the government started to do away with Native nations themselves, making their lands "open" lands. A simple



resolution of the House of Representatives in 1953, House Concurrent Resolution 108, terminated the sovereignty of one hundred Native nations.

Another element in the process was the transfer to certain states of federal jurisdiction over reservation areas. The authority for this transfer was Public Law 280, passed by Congress in 1954—one of the most bold and discriminating actions against Natives in the legal and judicial system. Moving without tribal consent, PL 280 initially handed five states jurisdiction over offenses committed by or against Natives on reservations; eventually, nine other states assumed limited jurisdiction. Upon the expansion of their legal domain over Natives, states mistakenly hoped to increase their revenue by taxing Native land and by receiving federal assistance to improve enforcement, corrections, and judicial agencies.

The timeworn argument was that reservations were "lawless." In 1952 Representative D'Ewart of Montana said that there was a "complete breakdown of law and order on many of the Indian reservations" and that the law was driven by "[t]he desire of all law abiding citizens living on or near Indian reservations for law and order" (quoted in Barsh and Henderson 1980, 128–129). The principal concern of Congress was, therefore, the reaction of white people to the perceived lawlessness (U.S. Commission on Civil Rights 1981). White communities that had settled on or near reservations, their growth partially a result of the allotment policy, were concerned about law and order outside their direct control and held the belief that Native law was irresponsible and federal law distant. PL 280 provided for their interests by endowing to various states criminal and civil jurisdiction on reservations. Witness the language used in a 1963 report titled "A Study of the Problems Arising from the Transfer of Law and Order Jurisdiction on Indian Reservations to the State of Montana":

Indian people hesitate to give up this powerful position which they hold in the United States society. They do not fully realize however, their responsibility when they seek to protect this powerful position. They must maintain a standard of society which is acceptable. This probably is the greatest weakness in the Indian position on law and order. The trend in modern society requires that Indian people conform to reasonable acceptable community standards of law and

order. . . . Any time that there is segregation in an area like law and order the attitude of segregation spreads into other areas. Segregation always sows the seeds of discrimination and racial problems. (Montana Office of the State Coordinator of Indian Affairs 1963)

Natives are depicted as irresponsible and "backward," as though they have not yet been civilized—all couched in terms of the fear of segregation. But segregation existed prior to 1963 and exists today in Montana.

Many Montana Native people were in opposition to PL 280 (known in Montana as House Bill 55). The chief proponent was state representative Jean Turnage, an enrolled member of the Confederated Salish and Kootenai Tribes (from Lake County on the Flathead Reservation) and a member of the Inter-Tribal Policy Board. Opponent Bill Youpee, chairman of the Fort Peck Tribal Council, expressed that the Inter-Tribal Policy Board was "influenced by outside interests" (*Great Falls Tribune*, 10 February 1963). The Flathead Tribal Council, under the direction of Walter McDonald, supported the transfer of jurisdiction to the state, although not all tribal members were in agreement. Moreover, all other tribes in Montana opposed such action, principally because PL 280 violated rights reserved in treaties and likewise violated the self-determination of sovereign nations. Another major issue was that PL 280 was a step toward the dreaded termination of all Indian reservations, as evidenced by House Resolution 108. PL 280 was passed by Congress in 1953, and in 1965, with the endorsement of the tribal council of the Confederated Salish and Kootenai Tribes, House Bill 55 (that is, PL 280) was implemented on the Flathead Reservation.

Many Natives perceive the imposition of state laws on reservations without tribal consent as blatant discrimination (U.S. Commission on Civil Rights 1981). Although the Indian Civil Rights Act of 1968 amended PL 280 to require tribal consent, this act also limits the penalties in tribal courts to imprisonment for six months and/or a fine of five hundred dollars, thereby effectively confining action in tribal courts to misdemeanors. Furthermore, the amendment authorizes states to retrocede jurisdiction already assumed—that is, relinquish it if burdensome. Tribes, however, are not empowered to demand retrocession (Barsh 1980).

PL 280 denies Native nations the right to govern themselves. There is also concern that under PL 280 state police and courts are treating



Natives and whites differently. Refusal to cross-deputize Native law enforcement personnel creates an imbalance whereby Euro-American police steadily send Natives to Euro-American courts and jails, while tribal police can only stand by and observe white criminal behavior. The result is a continuous and increasing supply of Native American "criminals." According to noted attorney Russel Barsh, "Arrests of Indians reportedly increase when per capitas or lease monies are [due to be] paid, to generate fines. Tribes contend that sentences are 'light and ineffective' for crimes against Indians, 'harsh and unjust' for crimes against non-Indians" (1980, 10).

PL 280 is curious in its uneven application. Not all states chose to apply its measures, and some selected only certain reservations within their boundaries. For instance, Montana has seven Indian reservations, but only on the Flathead Reservation is Euro-American jurisdiction extended through PL 280. Not surprisingly, Flathead includes a large white population due to various acts of Congress, including allotment and homesteading implemented at the turn of the century. A challenge would be to determine the proportion of Salish and Kootenai—the tribes of Flathead—among the Montana Natives involved in the state's criminal justice system. One would expect to find more Salish and Kootenai pass through the legal system than members of other tribes, with the exception of Landless Native Americans.<sup>7</sup>

Non-Natives are now immune from tribal prosecution, in both criminal and civil matters, due to a 1978 U.S. Supreme Court ruling in *Oliphant v. Suquamish*. In states where cross-deputization has not been worked out, many non-Natives who violate state law on reservations go unapprehended. This has been, and continues to be, a national Native American concern as tribal leaders fear white people will see the reservations as areas to "do anything they please without fear of arrest or judicial reprisal" (Wachtel 1980, 13). Moreover, in 1981 in *Montana v. United States*, the U.S. Supreme Court ruled that white people who own land on the Crow Reservation are not under the authority of Crow hunting and fishing laws on or near the Big Horn River. This decision violates the Crow treaty of 1868. Additionally, this case takes the ruling in *Oliphant* one step further toward the dissolution of tribal sovereignty (Churchill and Morris 1992).

Five statutory enactments of the U.S. Congress—the General Crimes Act, Major Crimes Act, Assimilative Crimes Act, PL 280, and the Indian Civil Rights Act—in addition to the court cases cited, all in-

fringe upon tribal powers to tackle crime issues on reservations (Deloria and Lytle 1983). These statutes have forged a legal sword that slashes at tribal sovereignty, and the cuts are not clean as continual redefinition by these statutes creates the problem of determining which among multiple authorities may handle alleged Native criminals. The road to legal jurisdiction on reservations travels through mazes. It is not a product of logic other than that of sporadic legislative responses to the demand for Euro-American hegemony over Indian Country. Meanwhile, a major handicap for reservation Natives today is the multiplicity of jurisdiction, wherein

The accused ordinarily confronts two jurisdictional "layers," general federal criminal laws applicable everywhere in the United States and concurrent state criminal law defining both related and separate offenses. On an Indian reservation the accused confronts as many as six jurisdictional layers, with as many as four possible forum-law outcomes: federal-federal, federal-state, state-state, and tribal-tribal. This does not mean that reservations are safer, only that it is harder for reservation residents to know fully their rights and liabilities, and easier for jurisdictional conflicts to arise. (Barsh 1980, 3)

The fundamental question, according to Deloria and Lytle (1983), is which level of government assumes jurisdiction over criminal offenses on reservations. Part of the answer requires determining the race of all involved to the extent of investigating past generations, the precise location within overlapping political boundaries where the alleged crime all or in part occurred, the appropriate statute of competing codes under which the violator can be prosecuted, and who has the political initiative at the moment. Indian reservations are the only places in the United States where the criminality of an act relies exclusively on the race of the offender and victim (Barsh 1980).<sup>8</sup>

## PUBLIC LAW 280 AND RETROCESSION

Since 1968, some tribes have been successful in their efforts to retrocede state jurisdiction to federal control (O'Brien 1989). Other tribes, however, encounter stereotypic expectations that Native Americans



cannot behave responsibly enough to exercise effective law enforcement, thereby threatening the safety of non-Natives (Barsh 1980). This is the attitude that the Confederated Salish and Kootenai Tribes face in their pursuit of retrocession. Opponents to retrocession cite that white people do not want to be subjected to a justice system they fear will discriminate against them because they are white. What they do not understand is that the withdrawal of PL 280 will not result in the confinement of white people in Flathead's tribal jail because prior court cases have opined that tribes do not have jurisdiction over non-Natives.

In the 1990s the Confederated Salish and Kootenai Tribes seek to withdraw from PL 280 jurisdiction for two basic reasons: to further self-determination and promote tribal sovereignty, and to develop a justice system that is culturally appropriate (Confederated Salish and Kootenai Tribes 1991). The tribes argue that they have made economic progress—after all, this has been the goal of federal policy—since they consented in 1965 to the implementation of PL 280. They offer as evidence a tribal budget of over \$70 million and twelve hundred tribal employees in the 1990s, compared to the eleven employees and budget of less than \$250,000 in 1963. When PL 280 was first proposed in 1963, the tribes were not financially able to provide law enforcement for people on the reservation, but this is no longer the case. Moreover, the tribes cite that the notion of justice predates European contact and that judges and courts have always existed in the social and political structure of the tribes. Subsequently, they have integrated traditional justice frameworks with Euro-American jurisprudence.

The Major Crimes Act of 1885 postulated that tribes did not have tribal institutions sufficient to maintain law and order (Barsh 1980). This was not true in the nineteenth century and it is not true today. The Confederated Salish and Kootenai Tribes boast a competent justice system, a system more capable than some counties in Montana (Confederated Salish and Kootenai Tribes 1991). The current tribal justice system on Flathead includes a tribal court system with three divisions (a trial court, a youth court, and an appellate court), a law and order department, fish and game enforcement, advocate program, and social service programs.

In 1989 54 percent of all arrests in Lake County, the primary county on Flathead, were Native American (Confederated Salish and Kootenai Tribes 1991). The Confederated Salish and Kootenai Tribes recognize

that most arrests on the reservation are alcohol- or drug-related. Responding to this issue, the tribes developed an extensive substance abuse program. They argue that withdrawal from PL 280 will enable them to rehabilitate those arrested for misdemeanors (felonies would fall under federal jurisdiction). In fact, the tribes have more substance abuse counselors than Lake County (nine compared to one) and are, therefore, better equipped to handle substance abuse problems than the county.

## RECUPERATING NATIVE WORLDS

Policies governing Native American affairs are legally bound to protect Native resources and treaty rights, but these policies have been perverted by Euro-American economic interests. The product is a system that imposes on indigenous populations cradle-to-grave control designed to obliterate worldview, political independence, and economic control. To resist is to be criminal, risking the wrath of multiple state law enforcement agencies. In the Americas, this exploitation has been the backbone of a colonial relationship now hundreds of years old yet still vigorous.

The Euro-American legal system, based on English common law and Euro-American statute law oriented to Euro-American values and philosophy, has never been able to accommodate within its bounds the different culture and aberrant status of the indigenous people. The goal of justice ostensibly sought by the legal system often results in the opposite when Natives are involved. The mechanisms of Euro-American law either are incapable of recognizing the cultural and legal separateness of Natives or are deliberately designed to destroy that independence (Washburn 1971).

Even when Native nations agreed to acculturate, they not only were thwarted but suffered additional castigation. There is probably no better documented case study of the cultural adaptation of a traditional legal system than that of the Cherokee Nation. *Fire and the Spirits* (1975), written by Rennard Strickland, examines the development of Cherokee legal institutions and the Cherokee Nation's attempt to acculturate. The Cherokee applied Euro-American laws that fit their needs and rejected those that did not. Their legal experience illustrates that it is in fact possible to create Native versions of Euro-American ways. The out-



come was not what Euro-Americans expected, as the Cherokee became deserving Native opponents, insisting that their customs should be honored. Yet the ways of Euro-Americans had been learned too well: Strickland concludes that in the end the Cherokee Nation would be obliterated. Damned if you do, damned if you don't; while assimilation is theoretically offered, equality is not a part of the bargain.

Although the Confederated Salish and Kootenai Tribes present another case of cultural adaptation with the blending of their traditional legal system and Euro-American jurisprudence, their fate may prove similar to the Cherokees'. The retrocession of PL 280 for the people of the Flathead Indian Reservation may never happen. Montana Senate Bill 368, which would give tribal police and courts additional criminal jurisdiction on reservations, died in 1993.

The Northern Cheyenne Tribe, a non-PL 280 reservation, presently struggles to reclaim their traditional system of law and order, one in which the Warrior Societies play a major role.<sup>9</sup> Evidently in agreement with the Cheyenne Tribal Court, the Warrior Societies recently employed traditional Cheyenne justice and banished two nonmembers from the reservation for a period of one hundred years (Crisp 1995). This action has not met with agreement from all tribal members, however, and the Northern Cheyenne remain divided over the actions of the Warrior Societies. A significant aspect of this case is that the Northern Cheyenne's justice system, as they are recreating it, demonstrates that modern tribal court systems and traditional systems can work together.

Chief Justice Robert Yazzie (1994) of the Navajo Tribal Court describes the Euro-American system of justice as one of hierarchies and power—a vertical system of justice. The Navajo word for “law,” brought to them by the Holy People, is *beebaz-aanii*, which means “fundamental, absolute.” Yazzie conveys that law is the source of a meaningful life, precisely because life emerges from it. In the Navajo system of law, one of horizontal justice, all parties are allowed to explain their views, and there is no one authority that ascertains the “truth.” This is a system of restorative justice based on equality and participation, with a notion of justice that involves recuperating both the offender and victim.

The concept of solidarity is important to Navajo healing and justice. Although difficult to translate, Yazzie expresses that solidarity

carries connotations that help the individual to reconcile self with family, community, nature, and the cosmos—all reality. That

feeling of oneness with one's surroundings, and the reconciliation of the individual with everyone and everything else, is what allows an alternative to vertical justice to work. It rejects the process of convicting a person and throwing the keys away in favor of methods that use solidarity to restore good relations among people. Most importantly, it restores good relations with self. (1994, 30)

The healing process, called *peacemaking* in English, is a complex system of relationships where there is no coercion or control because there is no need for such power. Additionally, there are no plaintiffs or defendants, and no one is right or wrong. The Navajo have a different concept of equality. The focus is not on equal treatment *before* the law; people are envisioned as equal *in* the law. For example, the vertical system of justice—the Euro-American system—requires of the defendant a plea of innocence or guilt. In the Navajo language there is no word for *guilty*—a word that assumes fault and thus punishment. Yazzie advises that the word *guilty* is a nonsense word in Navajo, because the Navajo focus on healing and reintegration with the goal of feeding and preserving healthy, ongoing relationships.

Navajo law is also based on distributive justice. According to Yazzie, Navajo Court decisions emphasize aiding the victim, not finding fault. The victim's wishes of compensation and the offender's financial ability are taken into account. The offender and his or her family are responsible to the victim and must pay compensation. The focus of distributive justice is the well-being of everyone in the community. Taking the notion of responsibility further, Yazzie conveys:

If I see a hungry person, it does not matter whether I am responsible for the hunger. If someone is injured, it is irrelevant that I did not hurt that person. I have a responsibility, as a Navajo, to treat everyone as if that person was my relative. Everyone is part of a community, and the resources of the community must be shared with all. (1994, 30)

The contemporary Navajo Peacemaker Court is founded upon the traditional principles of distributive justice and restoration over punishment. The Navajo operated under a vertical system of justice from 1892 to 1959 under the Court of Indian Offenses and from 1959 to the present day under the Courts of the Navajo Nation (Yazzie 1994). Intensely weary of the vertical system, in 1982 they created the Navajo



Peacemaker Court. The court selects a peacemaker, or *naat' aanii*—a person known for wisdom, integrity, and respect. His or her job is to ensure a decision in which everyone benefits. The court attempts to reclaim the original philosophical reasoning of traditional Navajo rather than simply blend cultures and philosophies.

The variance between Euro-American and Native worlds is apparent in how they work to maintain the social order. In Indian Country collective ways were developed to right an offensive activity with the larger harmony, recuperate the offender, and thereby protect the people. On the other hand, the Euro-American system of institutionalized justice featuring legislated law, aggressive enforcers, and punitive judges acts beyond controlling activity within the Euro-American world; it is also instrumental in fulfilling the Manifest Destiny of the Euro-American world—its own expansion. Intrusion into Indian Country was spearheaded by Euro-American law and the territory secured in the same manner. The federal government has embraced conflicting policies regarding Native people, shifting from genocide to expulsion, exclusion, and confinement, and later to supposed assimilation—the rhetoric was integration, the reality was confinement and domination. Amid the roller coaster of federal policy, one thing is crystal clear: at every stage of colonialism, Native people have been disempowered.

Some Euro-American criminologists agree that the Euro-American justice system represents the interests of the powerful and is inherently oppressive (Hartjen 1978; Quinney 1970; Turk 1976). The recognition that law and its administration is biased against certain categories of people is crucial to understanding Native American criminality. Nevertheless, one must first distinguish between Euro-American and Native worlds to grasp the role of Euro-American law in their collision.

To mechanically explain Native Americans by means of production, skin color, cultural practices, and so on is to peer through a tunnel—a tunnel engineered straight, perhaps, but a tunnel nonetheless. Absolutely, race/ethnicity, gender, class, and lifestyle are important concerns to Natives who feel the weight of their consequences both within Indian Country and in relations with Euro-Americans, but care must be taken not to let those issues obscure the broader battle between worlds and the emergence of neocolonial racism.

History tells us that Native “criminals” were not lawless “savages” but rather were living in the turbulent wake of a cataclysmic clash where

Native legal systems, along with everything else, collided with a most different world. Native worlds have been devastated by their relationship with Euro-Americans and their laws. The number of jailed Natives is a disheartening indication—a reminder that because deviance is a social construct, official crime statistics reveal discretion in defining and apprehending criminals. The behavior of reservation Natives, from both PL 280 and non-PL 280 reservations, is clearly subject to greater scrutiny, especially considering the number of criminal jurisdictions they fall under, and there is a greater presumption of guilt than for Euro-Americans. This assumption is based on the prevalence of Native Americans in the official crime statistics and the composition of prison populations. But the battle for jurisdiction in the remainder of Indian Country, where various Euro-American legal entities led by the federal government compete for primacy over tribes, is a telling example of the continuing struggle for sovereignty.